RECORD AND BRIEFS

No. 16-1435

FILED
SEP - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE,
ANDREW E. CILEK, AND SUSAN JEFFERS,

Petitioners,

vs.

JOE MANSKY, IN HIS OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR RAMSEY COUNTY; VIRGINIA GELMS, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR HENNEPIN COUNTY; MIKE FREEMAN, IN HIS OFFICIAL CAPACITY AS HENNEPIN COUNTY ATTORNEY; JOHN CHOI, IN HIS OFFICIAL CAPACITY AS RAMSEY COUNTY ATTORNEY; STEVE SIMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

ROBERT B. ROCHE
RAMSEY COUNTY ATTORNEY'S OFFICE
121 7th Place East, Suite 4500
St. Paul, MN 55101
(651) 266-3230

Attorneys for Respondents Joe Mansky and John J. Choi

NATHAN J. HARTSHORN
OFFICE OF THE MINNESOTA ATTORNEY GENERAL
445 Minnesota Street, Suite 1800
St. Paul, MN 55101
(651) 757-1252

Attorneys for Respondent Steve Simon

DANIEL P. ROGAN*
**Counsel of Record*
BETH A. STACK
HENNEPIN COUNTY ATTORNEY'S OFFICE
A-2000 Government Center
Minneapolis, MN 55487
(612) 348-5529
daniel.rogan@hennepin.us

Attorneys for Respondents Virginia Gelms and Michael O. Freeman

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

QUESTION PRESENTED

Section 211B.11, subd. 1 of the Minnesota Statutes creates a protected zone within 100 feet of a polling place on Election Day and also prohibits individuals who enter the polling place from wearing "a political badge, political button, or other political insignia" while inside the polling place.

The question presented in the petition is whether Minnesota's law prohibiting individuals from wearing "a political badge, political button, or other insignia" within the polling place on Election Day is unconstitutional on its face because it violates the First Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Introduction	1
II. Parties	2
III. Minnesota's Speech Limitations Within Polling Places	4
IV. Petitioners' Lawsuit	5
ARGUMENT	11
I. The Petition Should Not Be Granted Because This Case Does Not Involve a "Speech-Free Zone," Nor Does It Involve a Statute with Substantial Overbreadth	11
A. The "Strong Medicine" of the Overbreadth Doctrine Is Not Needed	12
B. The Court of Appeals Correctly Held that Section 211B.11 Is Not Substantially Overbroad	14
1. The polling place is a nonpublic forum, and speech restrictions must be reasonable and viewpoint neutral	15
2. Section 211B.11 is a reasonable, viewpoint-neutral limitation on speech in the polling place	20

TABLE OF CONTENTS – Continued

Page

3. Petitioners' argument that Section 211B.11 is overbroad because everything is "political" is baseless..... 26

II. The Court of Appeals' Decision Does Not Conflict with Any Decisions from Other Circuits 29

III. The Court of Appeals' Decision Does Not Conflict with Any Supreme Court Precedent 33

A. The Court of Appeals' Decision Does Not Conflict with *Jews for Jesus* 33

B. Review of the Forum Analysis Is Unnecessary Because It Is An Appropriate Test for Political Speech in a Nonpublic Forum 35

CONCLUSION..... 38

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Am. Fed'n of State, County & Mun. Employees, Council 25 v. Land, 583 F. Supp. 2d (E.D. Mich. 2008) 19

Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) 33, 34, 35

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 13

Broadrick v. Oklahoma, 413 U.S. 601 (1973) ..... *passim*

Bryant v. Gates, 532 F.3d 888 (D.C. Cir. 2008) 37

Burson v. Freeman, 504 U.S. 191 (1992) ..... *passim*

Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez, 561 U.S. 661 (2010) 15, 16

Citizens for Police Accountability Political Comm. v. Browning, 572 F.3d 12 (11th Cir. 2009) 22, 29

Citizens United v. FEC, 558 U.S. 310 (2010) 29, 30, 36

City of Houston, Tex. v. Hill, 482 U.S. 451 (1987) 12

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) 7, 16, 20, 24, 37

Cotz v. Mastroeni, 476 F. Supp. 2d 332 (S.D.N.Y. 2007) 19

Greer v. Spock, 424 U.S. 828 (1976) 37

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 37

TABLE OF AUTHORITIES – Continued

Page

Marlin v. District of Columbia Bd. of Elections and Ethics, 236 F.3d 716 (D.C. Cir. 2001).....19, 29

McCullen v. Coakley, ___ U.S. ___, 134 S. Ct. 2518 (2014).....36

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).....30

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).....13, 28

Mills v. Alabama, 384 U.S. 214 (1966).....10, 24

Minnesota Majority v. Mansky, 789 F. Supp. 2d (D. Minn. 2011).....9, 10

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).....15

New York v. Ferber, 458 U.S. 747 (1982).....12, 21

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988).....13

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999).....29, 30

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).....*passim*

PG Publ'g v. Aichele, 705 F.3d 91 (3d Cir. 2013).....19

Pleasant Grove City v. Summum, 555 U.S. 460 (2009).....16

Ramos v. Carbajal, 508 F. Supp. 2d 905 (D. N.M. 2007).....19

TABLE OF AUTHORITIES – Continued

Page

Reed v. Purcell, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010) 31, 32

Reynolds v. Sims, 377 U.S. 533 (1964) 24

Russell v. Lundergan-Grimes, 784 F.3d 1037 (6th Cir. 2015) 30

Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993) 22, 29

United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004) 19, 22, 29

United States v. Kokinda, 497 U.S. 720 (1990) 37

United States v. Stevens, 559 U.S. 460 (2010) 7

United States v. Williams, 553 U.S. 285 (2008) 13, 28

Virginia v. Hicks, 539 U.S. 113 (2003) 13

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 7, 21, 28

Williams-Yulee v. Florida Bar, ___ U.S. ___, 135 S. Ct. 1656 (2015) 28

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014) 29, 30

MINNESOTA CASES

Erickson v. Sunset Mem'l Park Ass'n, 108 N.W.2d 434 (Minn. 1961) 27

State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695 (Minn. 1996) 26

TABLE OF AUTHORITIES – Continued

Page

State ex rel. Pearson v. Probate Court of Ramsey County, 287 N.W. 297 (Minn. 1939) 27

Van Asperen v. Darling Olds, Inc., 93 N.W.2d 690 (Minn. 1958) 27

OTHER STATE CASES

Picray v. Secretary of State, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997) 31

Poniktera v. Seiler, 104 Cal. Rptr. 3d 291 (Cal. Ct. App. 2010) 19

FEDERAL RULES

Fed. R. Civ. P. 12(b)(6) 6

MINNESOTA STATUTES

Minn. Stat. § 204C.06 ..... 18, 23

Minn. Stat. § 204C.10 18

Minn. Stat. § 204C.13 18

Minn. Stat. § 211B.01 27

Minn. Stat. § 211B.11 ..... *passim*

OTHER MINNESOTA AUTHORITIES

1893 Minn. Laws, Ch. 4, § 108 ..... 4, 23

1912 Minn. Laws, Ex. Sess., Ch. 3, §§ 13, 14 ..... 4, 23

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Ariz. Stat. § 16-1018 31
Del. Code Title 15 § 4942.....23
La. St. Rev. § 18:1462(A)(3-4) 23
Mont. Code Ann. § 13-35-211 23
N.D. Cent. Code § 16.1-10-03.....23
N.J. Stat. § 19:34-19.....23
Or. Stat. § 260.695(4) 31
Tenn. Stat. § 2-7-111(b) 17
Tex. Election Code § 61.010.....23

STATEMENT OF THE CASE

I. Introduction

The Court should deny the petition for certiorari. There are no compelling reasons for this Court to review the U.S. Court of Appeals for the Eighth Circuit's determination that petitioners' First Amendment facial challenge failed as a matter of law. Despite petitioners' claim that the court of appeals erred in its application of the overbreadth doctrine, the court of appeals' analysis is in accord with other circuit court decisions, does not conflict with any Supreme Court precedent, and does not present a significant issue that needs to be addressed by this Court. The court of appeals' legal conclusion that the interior of a polling place is a nonpublic forum in which speech restrictions are constitutional as long as they are reasonable and viewpoint neutral is the same conclusion reached by every court that has analyzed the issue and constitutes a logical and straightforward application of *Burson v. Freeman*, 504 U.S. 191 (1992). Petitioners' facial overbreadth challenge is not appropriate for review because the court of appeals' dismissal of this claim is in harmony with Supreme Court precedent and other circuit court decisions.

This Court need look no further to deny this petition than the fact that petitioners' as-applied challenge was summarily rejected by the court of appeals and review was not sought. Petitioners' as-applied challenge was centered on the same argument presented here – application of this statute to "political" non-campaign

material (petitioners' "political" non-campaign buttons and t-shirts) violates the First Amendment. Thus, petitioners' argument in the petition is predicated on this Court concluding that although the statute was constitutionally applied to petitioners, it is still overbroad as a matter of law because it could sweep too broadly. This Court should deny the petition because any overbreadth in that statute – which was constitutionally applied to petitioners – can be corrected in future as-applied challenges.

II. Parties

Petitioner Minnesota Voters Alliance is a group that purports to be concerned about the integrity of elections. Petition ("Pet.") 2. During the 2010 election, Petitioner Andrew E. Cilek was an eligible voter in Hennepin County, Minnesota, and Petitioner Susan Jeffers was an election judge in Ramsey County, Minnesota. Appendix ("App.") E-3, E-7.

In 2010, Minnesota Voters Alliance was part of a coalition known as Election Integrity Watch with two other organizations, Minnesota Majority and Minnesota North Star Tea Party Patriots.[1] App. E-3. Election Integrity Watch orchestrated a public campaign to affect behavior within the polling place on Election Day 2010 by creating and disseminating a "Please I.D. Me" button to be worn by voters inside the polling place,

---

[1] Election Integrity Watch, Minnesota Majority, and Minnesota North Star Tea Party Patriots were plaintiffs in the action below but are not currently petitioners.

even though Minnesota does not have a photo identification requirement to vote. App. C-12. The button stated "Please I.D. Me" in large letters and listed both a toll-free phone number and EIW's website address. App. G-1. The Minnesota North Star Tea Party Patriots (a part of the Election Integrity Watch coalition) also distributed t-shirts and other apparel from the national Tea Party Patriots organization with the Tea Party's logo and related political slogans, including "Don't tread on me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." App. H-1, H-2.

On the eve of Election Day 2010, petitioners (among other plaintiffs) sought a temporary restraining order ("TRO") against the Minnesota Secretary of State, the Hennepin County Attorney and Elections Manager (the "Hennepin County respondents"), and the Ramsey County Attorney and Elections Manager (the "Ramsey County respondents") (together "respondents") to enjoin enforcement of a portion of Section 211B.11, subdivision 1 ("Section 211B.11"), of Minnesota Statutes, so that voters could wear the "Please I.D. Me" buttons and Tea Party Patriots t-shirts in the polling place on Election Day. App. D-3. On November 1, 2010, after a hearing, the district court denied the TRO. *Id.* Despite that ruling, on Election Day 2010, Petitioner Cilek wore both a "Please I.D. Me" button and a Tea Party Patriots t-shirt to his polling place in Hennepin County, Minnesota. App. E-7.

III. Minnesota's Speech Limitations Within Polling Places.

Section 211B.11, subdivision 1, of the Minnesota Statutes prohibits displaying "campaign material," posting "signs" or soliciting voters within 100 feet of the polling place and prohibits people from wearing "a political badge, political button, or other political insignia . . . at or about the polling place." The statute is the current codification of a Minnesota law that dates back to 1893, designed to protect Minnesotans' right to vote in an orderly and controlled environment without confusion, interference, or distraction. *See* 1893 Minn. Laws, Ch. 4, § 108; 1912 Minn. Laws, Ex. Sess., Ch. 3, §§ 13, 14.

On the eve of Election Day 2010, after the district court denied petitioners' motion for a TRO, respondents issued identical policies on Section 211B.11 to all polling places, to clarify the limited scope of Section 211B.11 and to provide guidance on what items were prohibited from inside polling places (the "Election Day Policy"). App. E-6, I-1 to I-3. The Election Day Policy first identified examples of "political" material prohibited from polling places, including but not limited to:

- Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

App. I-1 to I-2.

The Election Day Policy then directed election judges to ask individuals to cover up or remove any political material while in the polling place. App. I-2. However, the Election Day Policy explicitly stated that "[e]ven if a voter refuses to [remove or cover political material], [election judges] must permit any eligible voter to receive a ballot and vote." *Id.*

IV. Petitioners' Lawsuit.

After the 2010 election, petitioners amended their complaint and respondents moved to dismiss the complaint as a matter of law. App. E-2. Petitioners' amended complaint contained four constitutional claims:

(1) a First Amendment challenge to Section 211B.11 as applied to petitioners through respondents' Election Day Policy (Count I);

(2) a due process claim (Count II);

(3) an equal protection claim (Count III); and

(4) a First Amendment challenge to Section 211B.11 on its face (Count IV).

App. E-8.

On April 29, 2011, the district court granted respondents' motions to dismiss the amended complaint in its entirety, concluding that petitioners failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. App. E-2. Petitioners appealed the dismissal of the First Amendment and equal protection claims. App. D-2. In an opinion dated March 6, 2013, the court of appeals affirmed in part and reversed in part. *Id.* The court affirmed the dismissal of petitioners' equal protection claim. App. D-15. With respect to the two First Amendment counts, the court reversed the district court's dismissal of petitioners' as-applied challenge and remanded this claim, App. D-12; it affirmed the dismissal of the facial challenge, App. D-10.

In analyzing petitioners' First Amendment claims, the court of appeals applied this Court's traditional First Amendment forum analysis and concluded that the inside of a polling place was a nonpublic forum and therefore Section 211B.11's limitations on speech were constitutional if they were viewpoint neutral and "'reasonable in light of the purpose which the forum at issue serves.'" App. D-8 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). The court of appeals reversed and remanded the as-applied challenge because it concluded that the district court considered matters outside the pleadings in

considering the application of Section 211B.11 to petitioners. App. D-12. The court of appeals was unanimous in its analysis and remand of this as-applied claim. App. D-12, D-15 (Shepherd, J., concurring in part and dissenting in part).

With respect to the facial challenge, the court of appeals noted that a law may be invalidated as overbroad only if "'a substantial number of its applications are unconstitutional, judged in relation to the statute's legitimate sweep.'" App. D-5 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010), quoting in turn *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The court also noted that the "'decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" *Id.* D-9 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (emphasis in original)).

The majority then concluded that Section 211B.11 has a "plainly legitimate sweep" when it prohibits speech about a political *campaign* (in contrast to *non-campaign* political speech) and stated:

> Even if Minnesota acted unreasonably in applying the statute to some material, the complaint does not allege that there were a "substantial number" of such unreasonable applications in relation to the statute's reasonable applications. *See Wash. State Grange*, 552 U.S. at 449 n.6. "[W]hatever overbreadth may exist should be cured through case-by-case

> analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). [Petitioners] ha[ve] failed to state a facial claim under the First Amendment against Minn. Stat. § 211B.11, subd. 1.

App. D-10.

Judge Shepherd agreed with the overbreadth standards employed by the majority in analyzing petitioners' facial challenge; however, in his dissent he expressed his belief that further factual development was required to determine how the restrictions in Section 211B.11 "are reasonable limits on free speech which rationally relate to the state's interest in maintaining order and preserving the integrity at the polling place[.]" App. D-18. He would have remanded this claim "to allow the record to be developed regarding [petitioners'] facial challenge." App. D-19.

Following the court of appeals' decision in 2013, petitioners filed their first petition for a writ of certiorari with this Court, in which they sought review only of their facial challenge to Section 211B.11. On December 16, 2013, this Court denied the petition. *See* 134 S. Ct. 824 (U.S. Dec. 16, 2013) (No. 13-185).

After this Court denied certiorari review, this case returned to the district court on the remand of petitioners' as-applied challenge. The district court granted summary judgment to respondents, concluding that Section 211B.11 and the Election Day Policy are constitutional as applied to both the "Please I.D.

Me" buttons and the Tea Party Patriots apparel. App. B-33, C-19. Based on the undisputed evidence regarding the membership and purpose of the Election Integrity Watch coalition, the district court found that Section 211B.11 was constitutional as applied to the "Please I.D. Me" buttons, which the court found were intended "to falsely intimate to voters in line at the polls that photo identification is required in order to vote in Minnesota" as part of "a campaign that aims to change state and local laws such that voters would be required to present photo identification at the polls." App. C-13 to C-14. Photo identification is not a requirement in Minnesota, but these buttons were part of an orchestrated effort to disrupt the polling place by asking voters to produce a Minnesota ID and confront poll workers, in order to get other voters in line to also produce IDs.

Based on the undisputed evidence regarding the Tea Party movement and the Tea Party apparel that petitioners sought to wear to the polls, the district court also found that Section 211B.11 was constitutional as applied to the Tea Party Patriots apparel. App. B-33. The district court observed that petitioners' "effort to deny the obviously political nature of the Tea Party . . . is as unconvincing now as it was when [petitioners] first made it at the outset of this case." App. B-30. To the contrary, the district court concluded that the "Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance." *Id.* (quoting *Minnesota Majority v. Mansky*, 789 F. Supp. 2d 1112,

1123 (D. Minn. 2011)). As a result, the district court found that "prohibiting [the Tea Party] apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum' at the polls." App. B-31 (quoting *Minnesota Majority*, 789 F. Supp. 2d at 1123-24, quoting in turn *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Recognizing the obvious constitutional application of Section 211B.11 to the "Please I.D. Me" buttons, Plaintiffs chose not to appeal this application to the court of appeals. App. B-9. Instead, petitioners appealed their as-applied claim only with respect to the Tea Party shirts, and the court of appeals affirmed the district court's ruling. App. A-7. Specifically, the court of appeals agreed with the district court's conclusion that "[e]ven if Tea Party apparel is not election-related, it is not unreasonable to prohibit it in a polling place" because "[i]n order to ensure a neutral, influence-free polling place, all political material is banned [by Section 211B.11]." App. A-6.

Petitioners now bring their second petition for a writ of certiorari. As with their 2013 petition, petitioners challenge only the dismissal of their facial challenge to Section 211B.11 under the First Amendment. Petitioners do not seek review of their as-applied challenge.

ARGUMENT

The Court should deny the petition because the court of appeals' decision – that Section 211B.11 is not overbroad but a reasonable and viewpoint-neutral regulation of speech in the nonpublic forum of a polling place – is in accord with the precedent of this Court, including *Burson*, 504 U.S. 191, as well as the decisions of the other circuit courts that have considered speech restrictions within the polling place. Neither the court of appeals' application of the forum analysis to a restriction of political speech within a polling place nor its overbreadth analysis raise any compelling legal issues requiring this Court's review.

I. The Petition Should Not Be Granted Because This Case Does Not Involve a "Speech-Free Zone," Nor Does It Involve a Statute with Substantial Overbreadth.

Petitioners assert this case is an appropriate vehicle for the Court to examine whether a "speech-free zone" comports with the First Amendment. Pet. 24. However, this case does not present that question. The only question presented by the Petition is whether Section 211B.11's prohibition on certain political speech in the polling place is facially overbroad. Pet. i. As the court of appeals correctly held, the statute does not have a substantial number of unconstitutional applications, relative to its legitimate reach – including its constitutional application to petitioners' "Please I.D. Me" button and Tea Party shirts. There is no compelling reason for this Court to consider a facial

overbreadth challenge to a statute that has been ruled constitutional as applied to petitioners.

A. The "Strong Medicine" of the Overbreadth Doctrine Is Not Needed.

Petitioners, who have abandoned their narrow "as-applied" challenge, now ask this Court to strike down Section 211B.11 as overbroad, even though it was constitutionally applied to petitioners. The Court should reject petitioners' attempts to minimize the burden required to strike down a statute on its face, even when First Amendment interests are involved. In light of the constitutional application of Section 211B.11 to petitioners, this case is not an appropriate vehicle to challenge any purported overbreadth of this statute.

The overbreadth doctrine constitutes a "departure from traditional rules of standing[.]" *Broadrick*, 413 U.S. at 613. If an overbreadth challenge succeeds, "any enforcement" of the regulation at issue is "totally forbidden." *Id.* This prohibition constitutes "strong medicine," which courts use "sparingly and only as a last resort." *Id.* Accordingly, this Court has held that even when statutes involve limitations on speech, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) (citing *New York v. Ferber*, 458 U.S. 747, 769 (1982)). Before striking down a statute, this Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly

legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003) (internal citations omitted).

This high standard for striking down a statute is needed because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119 (quoting *Broadrick*, 413 U.S. at 615). This Court has warned that "invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects," and therefore, the Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis in original) (citing *Fox*, 492 U.S. at 485; *Broadrick*, 413 U.S. at 615).

Furthermore, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Id.* at 303 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Rather, to prevail on an overbreadth challenge petitioners "must demonstrate from the text of [a statute] *and from actual fact* that a substantial number of instances exist in which the [statute] cannot be applied constitutionally." *New York State Club Ass'n,*

Inc. v. City of New York, 487 U.S. 1, 14 (1988) (emphasis added).

Because application of Section 211B.11 to petitioners' "Please I.D. Me" buttons and Tea Party shirts did not violate the First Amendment, this case is not an appropriate vehicle for this Court to examine whether Section 211B.11 could be unconstitutionally overbroad. There is no evidence in the record of inappropriate application in the last 130 years. Moreover, the statute was constitutionally applied to petitioners' apparel. Nonetheless, petitioners make the absurd argument that the statutory language could be construed very broadly to prohibit voters from wearing certain colors to polls. Pet. 22. As the court of appeals recognized in its 2013 opinion, "[w]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." App. D-10 (quoting *Broadrick*, 413 U.S. at 615-616). Because the actual facts show a much more limited scope of Section 211B.11, review of petitioners' facial challenges is not needed.

B. The Court of Appeals Correctly Held that Section 211B.11 Is Not Substantially Overbroad.

Petitioners' argument that Section 211B.11 is unconstitutionally overbroad is centered entirely on their contention that to the extent that it prohibits certain "political" apparel from the polling place, rather than only banning "campaign" apparel, i.e., apparel that

explicitly identifies a political party, candidate, or ballot question, it is unconstitutional on its face. Pet. 10, 21. There is no dispute that Section 211B.11 prohibits certain partisan material within the polling place that is not campaign material. However, preventing individuals from both wearing "campaign" material and "political" material – both designed to express support for a particular political ideology and to influence or impact voters *while they are in the polling place on Election Day* – is a "reasonable" limitation on speech, considering the narrow purpose of the polling place as a nonpublic forum.

1. The polling place is a nonpublic forum, and speech restrictions must be reasonable and viewpoint neutral.

The court of appeals' unanimous holding that the interior of a polling place is a nonpublic forum – in which speech restrictions need only be reasonable and viewpoint neutral – is solidly grounded in this Court's precedent. For more than thirty years, the forum analysis has been "a fundamental principle of First Amendment doctrine." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984) (citing *Perry Educ. Ass'n*, 460 U.S. at 46); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.") (footnote omitted).

The forum analysis is predicated on the fact that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800. As a result, this Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800. This Court has identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802.[2]

A forum analysis of speech restrictions within polling places must focus on the intended purpose of polling places and the activity that takes place within them. Statutes limiting political activity in and around polling places like Section 211B.11 have been in effect in every state for many years. In *Burson*, this Court

---

[2] The Supreme Court has more recently described the third category, the nonpublic forum, as a "limited public forum." *See Christian Legal Soc'y*, 130 S. Ct. at 2984 n.11. This change in terminology of the third category has not changed the governing standard, as a "limited public forum," like a "nonpublic forum," may be "'limited to use by certain groups or dedicated solely to the discussion of certain subjects,'" and a governmental entity "'may impose restrictions on speech that are reasonable and viewpoint-neutral.'" *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)). Respondents will refer to this third category as a nonpublic forum, as the court of appeals did.

employed the forum analysis in its review of a Tennessee statute that is extremely similar to Section 211B.11. 504 U.S. at 193 (1992) (plurality). The statute at issue in *Burson*, Tenn. Stat. § 2-7-111(b), created a "campaign-free zone" within 100 feet of the entrance to a polling place and the building in which the polling place was located by prohibiting "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question." *Id.* at 193-94. The plurality first concluded that because the campaign-free zones included sidewalks and streets adjacent to polling locations, the law banned speech in *public* forums and was therefore subject to exacting scrutiny. *Id.* at 196 n.2, 198.

The Court then considered whether the Tennessee law satisfied exacting scrutiny. The Court examined the history of voting procedures in the United States, including specifically the characteristics of an official ballot and ballot secrecy. *Id.* at 202. The Court noted that "all 50 States limit access to the areas in and around polling places," *id.* at 206 (citations omitted), and then stated:

> In sum, an examination of the history of election regulations in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part

> by a restricted zone around the voting compartments. We find this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Id. Although the Court "reaffirm[ed] that it is the rare case in which . . . a law survives strict scrutiny," it concluded that the Tennessee statute met the standard because "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect" voters' right "to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211.

In contrast to the public space (sidewalks and streets) outside a polling place addressed in *Burson*, the forum at issue here is the interior of the polling place itself – a highly regulated location, supervised by election officials, where individuals (1) confirm they are registered to vote or register to vote; (2) receive a ballot; (3) vote at a private voting station; (4) turn in their ballot to be counted; and then (5) leave. *See* Minn. Stat. §§ 204C.06, 204C.10, 204C.13. In practice, the inside of a polling place has never been a traditional public forum like a public park, street, or sidewalk – in other words, it is not a space "devoted to assembly and debate." *Burson*, 504 U.S. at 196, quoting *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Burson*, 504 U.S. at 214, 216 (Scalia, J., concurring in the judgment) ("[R]estrictions on speech around polling places on election day are as venerable a part of the American tradition

as the secret ballot," and "the environs of a polling place, on election day, are simply not a 'traditional public forum[.]'").

Instead, the interior of the polling place can only be considered a nonpublic forum, reserved for its singular intended use: "each voter's communication of his own elective choice . . . carried out privately – by secret ballot in a restricted space." *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001). Therefore, it is not surprising that every court to consider the issue has concluded that the interior of a polling place on Election Day is a nonpublic forum. *See PG Publ'g v. Aichele*, 705 F.3d 91, 100 (3d Cir. 2013); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004); *Marlin*, 236 F.3d at 719; *Am. Fed'n of State, County & Mun. Employees, Council 25 v. Land*, 583 F. Supp. 2d 840, 847-848 (E.D. Mich. 2008); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364-365 (S.D.N.Y. 2007); *Ramos v. Carbajal*, 508 F. Supp. 2d 905, 919 (D. N.M. 2007); *see also Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291, 302 (Cal. Ct. App. 2010) ("The comments of both Justice Scalia's concurring opinion in *Burson*, as well as the dissent, confirm our reading that *Burson* understood it was *not* approving the application of strict scrutiny to restrictions on conduct *within* the confines of the polling station[.]") (emphasis in original).

Because the interior of a polling place is a nonpublic forum, the appropriate test for analyzing the constitutionality of Section 211B.11's limitation on

individuals wearing "a political badge, button, or other political insignia" is whether the restriction is viewpoint neutral and "reasonable in light of the purpose" served by polling places on Election Day. *Perry Educ. Ass'n*, 460 U.S. at 49. The reasonableness test grants the government significant latitude because the speech restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808 (emphasis in original).

With its decisions in this case, the Eighth Circuit became the fourth circuit court to hold that the interior of a polling place was a nonpublic forum in which speech restrictions need only be reasonable and viewpoint neutral. *See* App. A-5; D-8. This holding is a logical application of the forum analysis and is in accord with *Burson*. Because the court of appeals properly analyzed the issue and applied this Court's precedent, certiorari is unnecessary.

2. Section 211B.11 is a reasonable, viewpoint-neutral limitation on speech in the polling place.

In its 2013 opinion, the court of appeals rejected petitioners' facial overbreadth challenge and concluded that Section 211B.11 has a "plainly legitimate sweep" with respect to political *campaign* speech. App. D-9. The court of appeals further concluded that Section 211B.11 was facially valid to the extent that it applied to certain political non-campaign speech, i.e., to political material unrelated to any candidate or ballot

measure. App. D-10.[3] In particular, the court of appeals noted that petitioners had not alleged any "'substantial number' of unreasonable applications in relation to the statute's reasonable applications." App. D-10 (citing *Washington State Grange*, 552 U.S. at 449 n.6). Even after petitioners' as-applied challenge was remanded, they did not produce any evidence of any unreasonable applications of Section 211B.11 – only speculation. Accordingly, petitioners do not offer any compelling argument for this Court to review the court of appeals' conclusion.

There can be no dispute that application of Section 211B.11 to political *campaign* material (e.g., "Vote for Obama") is clearly constitutional. *See Burson*, 504 U.S. at 211 (holding that a statute restricting speech "related to a political campaign" within 100 feet of the outside of a polling place survived strict scrutiny). Therefore, because application of Section 211B.11 to prohibit "political" buttons, badges, and paraphernalia that are political *campaign* material is constitutional, this statute has a "'plainly legitimate sweep,'" App. D-9 (quoting *Ferber*, 458 U.S. at 769-70). Petitioners concede this point. Pet. 10, 21.

---

[3] In its 2017 opinion, the court of appeals explicitly concluded that application of this statute to petitioners' non-campaign, political shirts was constitutional. *See* A-6 ("Banning apparel with [the Tea Party] name and logo is 'reasonable because it is wholly consistent with the [state]'s legitimate interest in preserving' polling place decorum and neutrality.") (citing *Perry Educ. Ass'n*, 460 U.S. at 50).

Nonetheless, petitioners contend that even under the reasonableness standard applicable to a nonpublic forum, Section 211B.11 is facially overbroad to the extent that it reaches any political *non-campaign* material. Pet. 9. The court of appeals rejected this argument (in both its 2013 and 2017 opinions), and its decision is consistent with other circuit courts that have upheld statutes prohibiting certain non-campaign related speech from near polling places. *See Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009) (upholding application of 100-foot campaign-free zone to individuals soliciting voters exiting the polling place on matters *not on the ballot*); *City of Sidney*, 364 F.3d at 748 (upholding Ohio's 100-foot campaign-free zone that prevented individuals from soliciting signatures on *non-ballot related* item, even in areas that included traditional public forums such as sidewalks); *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993) (upholding Louisiana's total ban on "politicking" within a 600-foot radius of the polling place and its application to *non-ballot related* political "buttons and T-shirts").

In *Browning*, *City of Sydney*, and *Schirmer*, the courts held that application of the relevant statutes to plaintiffs' non-ballot related speech satisfied strict scrutiny because the speech at issue in each case was the area immediately outside of the polling place. Here, of course, because the speech limitation is limited to the interior of a polling place, Section 211B.11's limitation need only be *reasonable*.

Section 211B.11 has existed for more than 100 years.[4] It is one of several Minnesota laws designed to ensure that the polling place on Election Day is a place where voters can calmly and efficiently cast ballots. *See e.g.* Minn. Stat. § 204C.06 (limiting who can be in a polling place, restricting movement of non-voters within the polling place, providing a sergeant-at-arms will "keep the peace," and prohibiting lingering within 100 feet of the building in which the polling place is located). Like similar prohibitions in many other states,[5] this provision bars "a political badge, political

---

[4] *See* 1893 Minn. Laws, c. 4, § 108; 1912 Minn. Laws, Ex. Sess., c. 3 §§ 13, 14.

[5] *See, e.g.*, Del. Code Title 15 § 4942 (banning "electioneering" at polling place and within 50 feet, including "wearing of any button, banner or other object referring to issues, candidates or partisan topics"); La. St. Rev. § 18:1462(A)(3-4) (banning from the inside of a polling place and within 600 feet placing or displaying "campaign cards, pictures, or other campaign literature," and "political signs, pictures, or other forms of political advertising); Mont. Code Ann. § 13-35-211(1) ("A person may not do any electioneering on election day within any polling place . . . that aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election."); N.J. Stat. § 19:34-19 ("No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room. . . ."); N.D. Cent. Code § 16.1-10-03 ("No individual may buy, sell, give, or provide any political badge, button, or any insignia within a polling place or within one hundred feet . . . from the entrance to the room containing the polling place while it is open for voting. No such political badge, button, or insignia may be worn within that same area while a polling place is open for voting."); Tex. Election Code § 61.010 ("[A] person may not wear a badge, insignia, emblem, or

button, or other political insignia" from inside the polling place. Minn. Stat. § 211B.11, subd. 1. As outlined above, because a polling place is a nonpublic forum, the relevant standard for reviewing this speech limitation is whether it is "reasonable in light of the purpose which [the polling place] serves." *Perry Educ. Ass'n*, 460 U.S. at 49. This limitation on speech "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

Section 211B.11's limitation on wearing political badges, buttons, and other paraphernalia is a reasonable method to ensure that the polling place is a location where citizens can exercise the right to vote without confusion, distraction or distress, and election officials can preserve the integrity and reliability of elections. *See Burson*, 504 U.S. at 211 (plurality) ("A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right."); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. . . ."); *Mills*, 384 U.S. at 218 (recognizing state's power "to regulate conduct in and around polls in order to maintain peace, order and decorum there").

Thus, the court of appeals correctly concluded that Section 211B.11 was not facially overbroad, given its

---

other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet. . . .").

plainly legitimate sweep related to the purpose of a polling place, whether applied to *campaign* speech or to other *political* speech. As the court of appeals recognized in its 2013 opinion, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." App. D-10 (quoting *Broadrick*, 413 U.S. at 615-616).

In this case, of course, the statute was subsequently upheld against petitioners' as-applied challenge as well. On remand, petitioners argued that even if the statute was constitutional on its face, it was nonetheless unconstitutional as applied to what petitioners described as the "inert" or "passive" political speech of the "Please I.D. Me" buttons and Tea Party shirts.[6] The court of appeals rejected petitioners' as-applied challenge, holding that "[e]ven if Tea Party apparel is not election-related," a ban on such political material is reasonable "[i]n order to ensure a neutral, influence-free polling place[.]" App. A-6. As noted above, petitioners do not seek review of their as-applied claim.

Despite losing their as-applied challenge, petitioners persist in their assertion that Section 211B.11 is unconstitutional on its face. This is precisely the same issue that was raised in petitioners' 2013 petition for a writ of certiorari, which was denied by this Court on

---

[6] The district court held that the statute was constitutional as applied to the "Please I.D. Me" buttons, *see* App. C-18 to C-19, and petitioners abandoned their claim relating to the "Please I.D. Me" buttons prior to their second appeal. App. B-9.

December 16, 2013. Given the procedural history of this case and the now-final ruling regarding Section 211B.11's constitutional application to political non-campaign material, there are no compelling reasons for this Court to grant the petition.

3. Petitioners' argument that Section 211B.11 is overbroad because everything is "political" is baseless.

Despite the constitutional application of Section 211B.11 to their political apparel, petitioners argue the statute is unconstitutionally overbroad because *everything* can be considered "political."[7] For example, petitioners assert that this statute could be applied to shirts that are red or blue. Pet. 22. This argument is built on an absurd construction of the word "political" that is not grounded in Minnesota law, common sense, or how the statute has been applied during the last 100 years.

There are no Minnesota cases construing Section 211B.11's speech limitation on wearing a "political badge, political button, or other political insignia." However, even without an explicit statutory definition, the meaning of "political" within Minnesota's anti-electioneering statute is plain and unambiguous. Under Minnesota law, words and phrases in the statute are to be given their plain and ordinary meaning. *See State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn.

---

[7] Petitioners have not made a vagueness challenge to Section 211B.11. *See* App. 9 n.2.

1996). Various provisions of the same statute must be interpreted in light of each other. *See Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958). Finally, statutes are construed to "avoid absurd or unjust consequences," *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (Minn. 1961), or constitutional problems, *see State ex rel. Pearson v. Probate Court of Ramsey County*, 287 N.W. 297, 302 (Minn. 1939).

The prohibition on wearing "political" paraphernalia within the polling place has a common-sense understanding. *See* Minn. Stat. § 211B.01, subd. 6 (2016) ("An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election."). *See also* App. I-1 to I-2 (Election Day Policy) (identifying non-campaign political material as "[i]ssue oriented material designed to influence or impact voting" and [m]aterial promoting a group with recognizable political views"). Petitioners and amici argue this Court's review is needed based on their catalogue of the type of material that they believe could be considered "political" and prohibited by Section 211B.11. *See, e.g.*, Pet. 22. Petitioners' speculation is an attempt to create overbreadth where none exists. Even if petitioners could identify a few examples of logos from organizations that should remain beyond the reach of Section 211B.11's ban, that does not upset the balance applicable to their overbreadth claim. "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an

overbreadth challenge.'" *Williams*, 553 U.S. at 303 (quoting *Taxpayers for Vincent*, 466 U.S. at 800).

Moreover, contrary to petitioners' claims, *see* Pet. 21, concerns of voter intimidation and distraction exist even with non-campaign political speech within the limited confines of the polling place. *See, e.g.*, *Burson*, 504 U.S. at 206-07 ("Intimidation and interference laws fall short of serving a State's compelling interests because they "deal with only the most blatant and specific attempts" to impede elections. . . . [U]ndetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."). As this Court pointed out in *Williams-Yulee v. Florida Bar*, "[t]he First Amendment does not confine a State to addressing evils [only] in their most acute form." ___ U.S. ___, 135 S. Ct. 1656, 1661 (2015).

Petitioners have not identified a substantial number of unreasonable applications relative to the statute's significant legitimate sweep. *See Washington State Grange*, 552 U.S. at 449 n.6. To the contrary, in the only concrete example to date, the statute was reasonably applied to petitioners' own political apparel, given its communication of recognizable political views. Thus, this argument does not create a need for this Court's review.

II. The Court of Appeals' Decision Does Not Conflict with Any Decisions from Other Circuits.

Petitioners also assert that review is needed because of "deep tension" among the "lower courts" regarding the constitutionality of a ban on political speech. Pet. 10-15. To the contrary, there is no split among the circuits on whether statutes can prohibit "political" material in or near the polling place. As outlined above, the Eighth Circuit joins the D.C., Fifth, Sixth, and Ninth Circuits in holding that a statute prohibiting political material in or in close proximity to a polling place does not violate the First Amendment. *See Marlin*, 236 F.3d at 718; *Schirmer*, 2 F.3d at 122-23; *City of Sidney*, 364 F.3d at 748; *Browning*, 572 F.3d at 1218-19.

In an attempt to manufacture a split among circuit courts, petitioners cite *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). These cases are focused on campaign finance regulations, when certain campaign finance reporting requirements are triggered, and the impact on groups who wish to engage in advocacy as part of the general public dialogue – not within a nonpublic forum. Similarly, amici cite *Citizens United v. FEC*, 558 U.S. 310 (2010), for their assertion that strict scrutiny must be applied to any regulation of political speech. Brief for Cato Institute, et al., as *Amici Curiae* ("Cato Am.") 7. In *Citizens United*, the Court was considering the "exclusion of a class of speakers from the *general*

public dialogue." *Id.*, 558 U.S. at 340 (emphasis added); *compare McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (applying exacting scrutiny to a general ban on distribution of anonymous campaign literature). In contrast to the regulations at issue in *Citizens United*, *North Carolina Right to Life*, and *Wisconsin Right to Life*, Section 211B.11 applies equally to all speakers and impacts only the interior of the polling place on Election Day, not the general public dialogue surrounding an election. The cases are obviously distinguishable, and most importantly, they do not apply the forum analysis that applies to the polling place. Accordingly, the Court should reject this attempt to manufacture a circuit court split (or a conflict with *Citizens United*) where none exists.

Amici also contend there is a circuit split based in part on the Sixth Circuit's decision in *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015). Brief for the America Civil Rights Union, et al., as *Amici Curiae* ("ACRU Am.") 8. In *Russell*, the court invalidated a 300-foot buffer zone around a polling place, concluding that although *Burson* had "created a 100-foot safe harbor," a larger 300-foot buffer could include adjacent spaces that are traditionally public fora, such as sidewalks and streets. *Id.*, 784 F.3d at 1051-52. Despite acknowledging the government's compelling interest in the buffer zone, the court concluded that the government had not met its burden to show that *Burson*'s 100-foot buffer zone was insufficient. *Id.* at 1053. No part of the *Russell* analysis conflicts with the court of appeals' conclusion that Section 211B.11 is a facially

valid regulation of speech within the interior of the polling place.

Petitioners also argue review by this Court is needed because the Oregon Court of Appeals and the United States District Court for the District of Arizona "invalidated" similar statutes to Section 211B.11. Pet. 15-18. Contrary to petitioners' claims, these two decisions do not conflict with the court of appeals' rejection of petitioners' facial challenge to Section 211B.11.

First, in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997), the Oregon Court of Appeals overturned an administrative fine imposed on a voter who wore a "political" button related directly to a ballot measure in the polling place. The Oregon Court of Appeals did *not* examine the First Amendment, did *not* apply the forum doctrine, and did *not* perform an overbreadth analysis. Instead, the challenge was predicated on the Oregon Constitution and the decision focused on whether Oregon's prohibition on wearing "political badge(s), button(s) or other insignia," Or. Stat. § 260.695(4), violated Article I, section 8 of the Oregon Constitution. *Picray*, 140 Or. App. at 594. Accordingly, the *Picray* decision, which is from an intermediate state court, and which does not even discuss the First Amendment, does not conflict with the court of appeals' overbreadth analysis in this case.

Second, in *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), the Court enjoined Maricopa County from applying Ariz.

Stat. § 16-1018, which punishes "[k]nowingly electioneer[ing] on election day within a polling place," to prohibit individuals from wearing Tea Party t-shirts to the polling place in the 2010 election. This case does not conflict with the court of appeals' decision for at least two reasons. First, the *Reed* court enjoined application of this statute because it concluded that Maricopa County had likely engaged in viewpoint discrimination by only applying the prohibition to the Tea Party and not to other political groups. *See* 2010 WL 4394289 at *3. For that reason, the *Reed* court concluded the plaintiffs had demonstrated a likelihood of success on their viewpoint discrimination claim, even under the applicable standard for a nonpublic forum. *Id.* Second, the court also concluded that Maricopa County had failed to identify an objective standard for the definition of "electioneering." *Id.* at *4. For that reason, the court concluded the plaintiffs had demonstrated a likelihood of success on their due process claim. Importantly, because the *Reed* Court found these infirmities, it did *not* apply this Court's forum or overbreadth analysis.

In contrast to *Reed*, here there is no dispute that Section 211B.11 and the Election Day Policy are viewpoint neutral.[8] Moreover, petitioners are not making a vagueness challenge and, unlike the lack of direction provided by Maricopa County about the meaning of the

[8] There is also no evidence in the record that Section 211B.11 was selectively applied in 2010 or in any previous or subsequent elections, though any such allegations would be irrelevant to petitioners' facial challenge.

word "electioneering," the Election Day Policy provides specific, viewpoint-neutral direction on the type of paraphernalia prohibited from the polling place on Election Day.

In sum, despite petitioners' claims to the contrary, there is no circuit split in this case, and neither *Picray* nor *Reed* conflict with the court of appeals' decision upholding Section 211B.11 against petitioners' facial challenge.

III. The Court of Appeals' Decision Does Not Conflict with Any Supreme Court Precedent.

A. The Court of Appeals' Decision Does Not Conflict with *Jews for Jesus*.

Petitioners assert that the court of appeals' decision conflicts with Supreme Court precedent – without explicitly identifying which Supreme Court precedent they rely upon for this argument. Pet. 18. It appears petitioners assert that review of the court of appeals' overbreadth analysis is needed because the court's decision conflicts with *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). Pet. 19.

The court of appeals' decision does not conflict with *Jews for Jesus*, because the speech restriction in that case is dramatically broader than Minnesota's limited speech restriction that applies only in polling places on Election Day. In *Jews for Jesus*, the Court was confronted with a resolution promulgated by the Board of Airport Commissioners for Los Angeles

International Airport. The resolution provided, in pertinent part: "the Central Terminal Area of Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." *Id.*, 482 U.S. at 570-71. In short, this ordinance, on its face, "reache[d] the universe of expressive activity, and, by prohibiting *all* protected expression, purport[ed] to create a virtual 'First Amendment Free Zone[.]'" *Id.* at 574 (emphasis in original). Not surprisingly, the Court held that the resolution was "substantially overbroad" and "not fairly subject to a limiting construction," *id.* at 577, noting that the resolution did "not merely regulate expressive activity . . . that might create problems such as congestion or disruption of the activities of those who use [the airport,]" but that it prohibited all First Amendment activity, including "even talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.* at 574-75. The Court concluded that, even if an airport was a nonpublic forum, no government interest could justify excluding all forms of protected expression from the airport and the ordinance was facially unconstitutional. *Id.* at 575.

Jews for Jesus is easily distinguishable from Section 211B.11 in several critical ways. First, unlike the resolution at issue in *Jews for Jesus*, Section 211B.11 does not purport to prohibit *all* protected expression; rather, it is limited to certain *political* material. Second, unlike an airport that is used by individuals 365 days a year to travel and by many others engaged in commerce and other activities, Section 211B.11 is limited to the inside of a polling place on Election Day, a

forum that is only used by a limited number of individuals for a brief amount of time and for one purpose: to vote. Third, Section 211B.11 does not even prohibit all buttons and t-shirts, but rather only those with "political" content. Section 211B.11 is significantly narrower in the type of speech it prohibits and the scope of the time and location where the prohibition applies than the speech prohibition at issue in *Jews for Jesus*.

Accordingly, the court of appeals' overbreadth analysis does not conflict with *Jews for Jesus*.

B. Review of the Forum Analysis Is Unnecessary Because It Is An Appropriate Test for Political Speech in a Nonpublic Forum.

Finally, petitioners imply in the petition, and amici assert, that the court of appeals' First Amendment analysis was erroneous because the court concluded that the interior of a polling place is a nonpublic forum, in which speech restrictions like Section 211B.11 are constitutional if they are reasonable and viewpoint neutral. Pet. 19; Cato Am. 4-6.[9] The court of appeals' unanimous holding on this issue is in accord with Supreme Court precedent and with every court decision that has analyzed speech restrictions within a polling place. *See supra* Section I.B.1, at 19.

---

[9] This was petitioners' primary argument in their 2013 petition that was denied by this Court.

Apparently recognizing the futility of arguing that a polling place is a public forum, amici simply argue that this Court's forum doctrine should be jettisoned when analyzing limitations of political speech. Cato Am. 6. The argument that this Court's forum analysis is inappropriate when the speech at issue is *political* speech (as opposed to non-political speech) finds no support in this Court's precedent. Not surprisingly, neither petitioners nor amici cite to a single case in which a court has concluded that the forum analysis is not appropriate because the speech at issue in the particular forum was political. Instead, as detailed above, amici cite to *Citizens United*, which considered a regulation that excluded a class of speakers from the general political discourse, unlike Section 211B.11. Cato Am. 7. Amici also cite to *McCullen v. Coakley*, ___ U.S. ___, 134 S. Ct. 2518 (2014), in which this Court invalidated a 35-foot buffer zone that applied only to abortion clinics as an unconstitutional time, place, or manner regulation of speech. ACRU Am. 16. Unlike the facts presented here, *McCullen* considered a content-neutral regulation (rather than the content-based regulation of Section 211B.11) and its impact on the public sidewalks surrounding the clinics (rather than the nonpublic forum of a polling place). *Id.*, 134 S. Ct. at 2535. Neither *Citizens United* nor *McCullen* applied the First Amendment analysis applicable to petitioners' facial challenge to Section 211B.11, and as a result, these cases are inapposite.

Contrary to amici's arguments, the Court has repeatedly applied the forum analysis to content-based

restrictions aimed at "political" speech. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990) (plurality opinion) (applying forum analysis and noting lower level of scrutiny applied to ban on political advertising on post office sidewalk); *Burson*, 504 U.S. at 211 (plurality) (applying forum analysis to law limiting "campaign speech" in public forum); *Cornelius*, 473 U.S. at 809 (applying forum analysis to uphold ban on legal defense and political advocacy groups from charity drive aimed at federal employees in nonpublic forum because "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); *Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (applying forum analysis and upholding regulation preventing political campaigning on nonpublic forum – a military base); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding city's refusal to accept political advertising on city buses); *see also Bryant v. Gates*, 532 F.3d 888, 896-97 (D.C. Cir. 2008) (holding that prohibition on "political" advertisements in Civilian Enterprise Newspapers (CENs), distributed on nonpublic fora of military installations, was reasonable in light of purpose of forum).

The fact that Section 211B.11's content restriction is aimed at "political" speech does not change the analytical framework from the traditional forum analysis to a per se rule requiring heightened scrutiny. The forum analysis was properly applied by the court of appeals to the statute challenged here, and as a result, there is no need for this Court to review the court of

appeals' decision rejecting petitioners' facial challenge to Section 211B.11.

CONCLUSION

Minnesota law, like that of every other state, has long protected the sanctity of the polling place by creating a zone in which the only occurrence is voting-related activity. A critical piece of this protection is Section 211B.11, a reasonable and viewpoint-neutral restriction on wearing "a political badge, political button, or other political insignia" inside the polling place. The court of appeals correctly concluded that this restriction was not facially overbroad. Respondents respectfully request that the Court deny the petition.

Dated: September 1, 2017

Respectfully submitted,

DANIEL P. ROGAN*
*Counsel of Record
BETH A. STACK
HENNEPIN COUNTY ATTORNEY'S OFFICE
A-2000 Government Center
Minneapolis, MN 55487
(612) 348-5529
daniel.rogan@hennepin.us

Attorneys for Respondents Virginia Gelms, in her official capacity as Elections Manager for Hennepin County, and Michael O. Freeman, in his official capacity as Hennepin County Attorney

ROBERT B. ROCHE
RAMSEY COUNTY ATTORNEY'S OFFICE
121 7th Place East, Suite 4500
St. Paul, MN 55101
(651) 266-3230
robert.roche@co.ramsey.mn.us

Attorneys for Respondents Joe Mansky, in his official capacity as Elections Manager for Ramsey County, and John J. Choi, in his official capacity as Ramsey County Attorney

NATHAN J. HARTSHORN
OFFICE OF THE MINNESOTA ATTORNEY GENERAL
445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101
(651) 757-1252
nathan.hartshorn@ag.state.mn.us

Attorneys for Respondent Steve Simon, in his official capacity as Minnesota Secretary of State